

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 97-2729-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WUA XIONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Monroe County: MICHAEL J. McALPINE, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 PER CURIAM. Wua Xiong appeals from a judgment convicting him on three felony charges, and from an order denying his postconviction motion for a reduced sentence. The issue is whether Xiong proved a new factor that entitled him to reconsideration of his sentence. We conclude that he did not, and therefore affirm.

¶2 In 1994, at the age of fourteen, Xiong participated with several older individuals in the attempted armed robbery of a gun dealership. Xiong entered the store armed, and exchanged fire with the owner. He was subsequently waived into adult court on a charge of attempted first-degree intentional homicide with weapons and gang enhancers, and for two other felonies and a misdemeanor. Pursuant to a plea agreement, he entered an *Alford* plea to the attempted homicide charge, and guilty pleas to the other felonies. The misdemeanor charge was dismissed.

¶3 At sentencing, the trial court was aware that Xiong lived in a Thai refugee camp until he was twelve, spoke very little English and came from a broken home. The court also knew that there was evidence Xiong shot at the store owner with intent to kill him, that he was involved with gangs, that he had been convicted of numerous juvenile offenses before the attempted homicide, and that he committed the present offenses after running away from a group home.

¶4 The Presentence Investigation Report author recommended prison sentences totaling forty years. Defense counsel recommended a twelve-year term, arguing that Xiong was an impressionable, disadvantaged boy induced into the crime by his older accomplices, who received prison terms of fifteen and twenty years, respectively. The prosecutor also asked the court for relative leniency, citing the arguably greater culpability of his older accomplices and his age and disadvantaged background.

¶5 The court sentenced Xiong to a thirty-five-year prison term on the attempted homicide charge, with consecutive probation on the other felonies. The court stressed the gravity of Xiong's crimes, the need to protect society from future, similar acts, the impact of the homicide attempt on the victim, and Xiong's

record of committing prior, serious offenses, and his failure to benefit from his prior involvement in the juvenile justice system. The court expressly discounted Xiong's age as a factor, and further stressed that his criminal acts were the product of free choice.

¶6 Postconviction counsel was subsequently appointed for Xiong. Her concerns about his competency to proceed led to four psychological evaluations and an ultimate trial court finding of competency. However, the evaluators generally agreed that Xiong was borderline mentally retarded. Three included comments in their evaluations indicating that Xiong's mental limitations and difficulties in adjusting to American culture made him passive and dependent on others, and more vulnerable to influence or manipulation.

¶7 Arguing that the psychological evaluations constituted a new factor, counsel moved to reduce Xiong's sentence. The trial court concluded that the "precise diagnosis" of Xiong's limitations were relevant to the sentencing decision, but did not meet the necessary standard of high relevance. The court noted that the information about Xiong's limitations was available at the time of sentencing, including the following excerpt from the PSI report:

The defendant speaks very little English and finds that to be a barrier in his ability to function independently in society. The interpreter ... indicates that during his experience interpreting for Wua during this legal process, he has noticed that Wua sometimes has trouble understanding things even in his own language and often times uses "I don't know" even though it doesn't appear that he has understood the question. He also indicates that he has no idea about the legal system.

This appeal challenges the court's conclusion that the evaluations are not "highly relevant" to the sentence.

¶8 The presence of a “new factor” allows the trial court to exercise its discretion to resentence a defendant. *See State v. Kluck*, 210 Wis. 2d 1, 6-7, 563 N.W.2d 468 (1997). Whether the defendant has shown the existence of a new factor is a question of law we decide *de novo*. *See State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). A new factor is information highly relevant to the sentence, but unknown at the time of sentencing because it did not then exist or was unknowingly overlooked. *See id.* To justify a modified sentence, the new factor must operate to frustrate the sentencing court’s intent in passing sentence. *See State v. Michels*, 150 Wis. 2d 94, 99, 441 N.W.2d 278 (1989).

¶9 The information in the psychological evaluations was not highly relevant to the sentence. The trial court imposed a sentence that was expressly intended to demonstrate the gravity of the crime and to protect the public from future, similar acts. It also reflected the court’s view of Xiong’s character, based on his substantial juvenile record and continued criminal activity. The fact that Xiong was intellectually limited and impressionable was of little relevance to these concerns.

¶10 Additionally, Xiong’s limitations were not unknown to the court. The quoted excerpt from the PSI report plainly and necessarily suggests Xiong’s intellectual limitations, under any reasonable view. Xiong’s difficulties in adjusting to American culture were extensively discussed at sentencing by the prosecutor, defense counsel and the court. The trial court correctly described the evaluations as more precise information of the same type, as opposed to new information.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5.

